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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. ~~1962~~ 92

III HAT ELKHORN COAL COMPANY, A CORPORATION,
Petitioner,

vs.

TED NEWMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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No.

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Hi Hat Elkhorn Coal Company, a Corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit, rendered on January 23, 1962, in connection with which a petition for rehearing was denied on May 7, 1962 and which reviewed a judgment of the United States District Court for the Eastern District of Kentucky, dismissing the respondent's complaint on the merits.

Reports

a. The District Court's opinion was rendered on June 1, 1960 and is not reported. A copy of that opinion is made a part of the appendix. The opinion of the Court of Appeals rendered January 23, 1962 is reported in 298 F. 2d 119. The further opinion of that court handed down on May 7, 1962, upon the petition for rehearing is not reported as of this date.

Jurisdiction

b. i. The judgment sought to be reviewed was entered and dated January 23, 1962. A petition for rehearing was denied and order entered on May 7, 1962.

ii. On January 29, 1962, appellee's time for filing petition for rehearing was extended to February 25, 1962. Appellee's petition for rehearing was filed on February 21, 1962. The petition for rehearing was denied on May 7, 1962.

iii. The jurisdiction of this court is invoked under U.S.C. Title 28, Section 1254.1.

Questions Presented

c. i. Did the petitioner, under the terms and provisions of the mineral conveyance from W. C. Goble, Master Commissioner, to Elkhorn Coal Corporation, have the right to use the surface of respondent's land for the processing of coal, including the washing thereof, which it mined from other lands?

ii. Is the respondent estopped from contending that petitioner does not have the right to operate and maintain the tipple and washer plant, insofar as it relates to coal mined from lands other than the tract of land described in the mineral conveyance, above referred to?

iii. Did the petitioner establish by adverse possession

its right to operate and maintain its tipple and washer plant insofar as it relates to coal mined from other lands?

iv. Did the proceedings taken in the Floyd Circuit Court (Ky) in the case of respondent against Hi Hat Elkhorn Mining Company, the immediate predecessor in title of petitioner, constitute res adjudicata of the issue presented in this case, relating to the right of petitioner to operate and maintain its tipple and washer plant insofar as it relates to coal mined from lands other than the tract of land described in the above mentioned conveyance?

Statement of the Case

e. The respondent, Ted Newman, is the owner of the surface of a rough mountain tract of land located on Newman Branch of Clear Creek in Floyd County, Kentucky, containing about one hundred acres (Respondent's Exhibit No. 2, 31b, 46b). Respondent's ownership of the surface is subject to a mineral conveyance dated March 25, 1929 from W. C. Goble, Master Commissioner, Floyd Circuit Court, to Elkhorn Coal Corporation (Respondent's Exhibit No. 1). This conveyance was executed in a partition proceeding to which the respondent was a party (Respondent's Exhibit No. 1). The instrument not only grants to Elkhorn Coal Corporation the coal and minerals underlying 418.13 acres of land, situate in Floyd County, Kentucky, which embraced the tract of land, the surface of which is owned by respondent, as well as lands not owned by him, but it also conveyed to grantee the mining rights set out on Pages 13-14 of this petition. The two exhibits, herein referred to, have been transmitted to this Court by the Clerk of the Court of Appeals.

Respondent's land is located on the right and left hand fork of Newman Branch. The part of the land on the left hand fork has never been cleared or cultivated and not more

than eight or ten acres on the right hand side of the branch have been in cultivation (14b-15b). In 1936 Payne Baber Coal Company constructed a tipple on respondent's land and began mining coal from his and adjacent lands, which had been leased to it by Elkhorn Coal Corporation. They used the tipple located on the surface of Newman's land for the purpose of processing the coal so mined, not only from the Newman tract but also from other tracts. The tipple was so used for a period in excess of seventeen years until it was destroyed by fire in 1943 (39b, 40b). Payne Baber Coal Company was reorganized as a result of proceedings filed under the bankruptcy act. Trustees were appointed and they operated the property until the organization of Hi Hat Elkhorn Mining Company (18b-19b).

The trustees mined from an area of approximately thirteen hundred acres, which consisted not only of the Newman tract but other tracts of land, which had been driven into through the Newman tract (19b). This method of mining was well known to respondent and to all other persons living in the community (17a, 19b, 40b).

After the tipple was destroyed by fire Hi Hat Elkhorn Mining Company rebuilt it and again placed it in operation within two months after the fire (40b).

In January, 1957, Elkhorn Coal Corporation executed to Hi Hat Elkhorn Mining Company a coal mining lease embracing 473.3 acres (See petitioner's exhibit No. 1), which embraced the lands described in the deed from W. C. Goble, Master Commissioner, and other lands.

This lease, among other things, required the lessee to immediately commence the construction of a coal cleaning and processing plant (27b).

During the summer of 1956, Hi Hat Elkhorn Mining Company began the construction of the washer plant, which occupied about 1/20 of an acre of Newman's land (See

petitioner's exhibit No. 2). This washer plant was used by Hi Hat Elkhorn Mining Company in connection with its tipple. The only difference in the processing of coal after the construction of the washer plant was that prior thereto the coal was washed by hand, but after the construction of the processing plant the coal is now washed automatically (43b).

This washer plant was constructed at a cost of $200,000.00 (36a). It is shown by the record without any contradiction that the seams of coal are so contaminated with partings that coal cannot possibly be mined and sold without the use of this processing plant (41a). The washer was first placed in operation on January 1, 1957 (20b, 39b). It was operated for the purpose of processing and washing coal continuously from that time and the respondent made no objection thereto until September 23, 1958, when he filed suit in the Floyd Circuit Court (Kentucky), against Hi Hat Elkhorn Mining Company by which he sought to recover $25,000.00 for damages to his land by the depositing of mine refuse and $50,000.00 because of the processing of coal from other lands over the tipple and washer plant, above referred to (Petitioner's exhibit No. 3, 1-3).

It is uncontradicted that the respondent knew about the construction of the washer plant and that he did not object to its construction or to its use at any time prior to the filing of this suit (9b-11b).

In the action filed in the Floyd Circuit Court by respondent against Hi Hat Elkhorn Mining Company, the jury were instructed that the coal company, under the provisions of the mineral conveyance from the master commissioner to Elkhorn Coal Corporation, *had the right to construct and operate the coal tipple and washer plant and that plaintiff cannot recover damages to his land which resulted from such operation* (10a) (Our italics).

The only item of damage submitted to the jury was in regard to the dumping of mine refuse on plaintiff's surface which it mined from other lands (10a). A verdict was returned for Newman in that action for $2500.00, upon which judgment was duly entered. The judgment recites that it should be contrued as a final determination of all damages to plaintiff's land described in the complaint to August 1, 1959 (12a). This case, on appeal, was reversed by the Court of Appeals of Kentucky. *Hi Hat Elkhorn Mining Company v. Newman*, 352 S. W. 2d 71. The court held that the only damages to which Newman was entitled was in regard to the dumping of mine refuse on his land which had been mined from other lands. A copy of that opinion is made a part of the appendix (See Appendix P. 29-30).

On August 1, 1959, and prior to the entry of this judgment, Hi Hat Elkhorn Mining Company conveyed all its leases and properties, except its open accounts, to petitioner, who paid Hi Hat Elkhorn Mining Company for such property the sum of $500,000.00 (33a). Within less than three weeks after the transfer, and without even mentioning the controversy to appellant, Newman instituted this action in the Floyd Circuit Court (Kentucky) seeking recovery of $10,000.00 damages and an injunction, enjoining the petitioner from dumping upon his land slate and other refuse from coal mined from other lands and from using the surface for the crushing, washing and grading or processing of coal from other lands (3a-4a).

The petitioner is a resident of the State of West Virginia and on September 9, 1959, removed this action to the United States District Court for the Eastern District of Kentucky (See first five docket entries).

The answer of defendant-appellee averred that it was the owner by lease of the coal and the mining rights set out on Pages 13-14 of this petition. It asked that its title

to such mining rights be quieted and adjudged free of any claim of the respondent. An amended answer and counterclaim was filed, which relied upon the defense of res adjudicata and election of remedies (7a-15a). The District Court dismissed the complaint for the reasons set out in his written opinion (48a-54b. See also Appendix pp. 23-28).

The Court of Appeals reversed the judgment of the District Court on the sole ground that the Court of Appeals of Kentucky in the case of *Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. 2d (Ky) 71, had decided that the petitioner did not have the right to process coal over its tipple and washer plant which it had mined from other lands and it adhered to this ruling in its opinion handed down on May 7, 1962, when the petition for rehearing was denied.

We firmly believe that the opinions of the Court of Appeals (Sixth Circuit), handed down on January 23, 1962 and May 7, 1962, are in error insofar as they hold that under the mineral conveyance from W. C. Goble, Master Commissioner, to Elkhorn Coal Corporation, that respondent, the lessee of Elkhorn Coal Corporation, does not have the right to use its tipple and washer plant for the processing of coal which it had mined from other lands and as we shall later point out in this petition, these opinions are in direct and irreconcilable conflict with all the cases on the question from the Court of Appeals of Kentucky.

Jurisdiction of the District Court

f. This case was commenced in the Floyd Circuit Court (Kentucky) by Ted Newman, a citizen of Kentucky, against Hi Hat Elkhorn Coal Company, a West Virginia corporation, in which the respondent sought to recover the sum of $10,000.00 and in addition thereto injunctive relief, which, if granted, would close down the mining operations

of petitioner (3a-4a). The action was removed by petitioner to the United States District Court for the Eastern District of Kentucky in strict conformity wih Title 28, U. S. C. Sections 1441, 1446. The jurisdiction of the District Court was based on U. S. C. Title 28, Sections 1332, 1441.

Argument

g. The opinion of the Court of Appeals is solely based on the cases of *Hi Hat Elkhorn Mining Company* v. *Newman* (Ky) 352 S. W. 2d 71 and *Pike-Floyd Coal Company* v. *Nunnery*, 232 Ky. 805, 24 S. W. 2d 614. Neither of these cases support the opinion of the lower court.

In *Hi Hat Elkhorn Mining Company* v. *Newman, supra*, Newman sued to recover $25,000.00 damages to his land for dumping of mine refuse which had been taken from other lands and an additional sum of $50,000.00 for the processing of coal which had been mined from other lands (See petitioner's exhibit No. 3, Pages 1-3).

In that case, the court instructed the jury that the coal company, under the provisions of the mineral conveyance from Goble to Elkhorn Coal Corporation, had the right to construct and operate the coal tipple and washer plant and plaintiff could not recover damages to his land which resulted from such operation (10a). The only question submitted to the jury was the damages to Newman's land caused by the unauthorized dumping of refuse which had been taken from other lands (10a).

A verdict was rendered against Hi Hat Elkhorn Mining Company in that case for $2500.00 and the coal company appealed. The error, relied upon, besides the question of excessive damages, was whether or not, under this mineral conveyance, the coal company had the right to leave upon Newman's land mine refuse taken from other lands. Newman filed no cross appeal and the record, as

made up, contained an instruction that the coal company had the right to operate the tipple and washer plant and that Newman could not recover damages because of such operation. The instruction did not limit this right to coal mined from the Newman tract, but applied it to all mining operations. It is, therefore, very clear that the question of processing of coal was not before the Court of Appeals of Kentucky in that action and was not decided by it. The only question which the Court of Appeals of Kentucky decided was that the coal company could not place on Newmen's land, mine refuse taken from other lands.

In this connection, let the court not overlook the statement in that opinion that "*the cause of the complaint was the dumping of refuse on the surface incident to the washing and otherwise processing of coal mined on both appellee's property and other tracts.*" (*Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. 2d (Ky) 71) (Our italics).

In holding that the coal company did not have the right to dump mine refuse on Newman's land, the court pointed out that "*while dumping refuse may be an integral part of the mining operations on a particular tract, it is not an authorized incident of removing coal from other tracts.*" (*Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. 2d (Ky) 71) (Our italics).

On the other hand, it must be remembered that the washing of coal not only is an integral part of any mining operation, but also is a necessary incident of removing coal from other tracts because the sole purpose of removing such coal is to bring it to market where it can be sold and it is not disputed that under modern conditions coal cannot be sold unless it is washed (41a).

It is to be noted that the Court of Appeals of Kentucky in the case of *Hi Hat Elkhorn Mining Company* v. *New-*

man, supra, did not expressly, or at all, decide that the processing of coal over the tipple and washer plant of petitioner, which was mined from other tracts of land, was an unauthorized incident of removing such coal. In fact, the opinion of the Court of Appeals of Kentucky in that case was based solely upon its prior decision in the case of *Pike-Floyd Coal Company* v. *Nunnery,* 232 Ky. 805, 24 S. W. 2d 614. In the Nunnery case the Court of Appeals of Kentucky had before it one question. That question related solely to the right of a coal company, under a similar deed, to place mine refuse on the surface which it had mined from other lands. The Court of Appeals of Kentucky, in the Nunnery case, decided that it did not have such right, but there is no word or sentence in that opinion which even intimates that the coal company did not have the right to use its tipple for the purpose of processing coal which was mined from other lands.

It should also not be overlooked that in *Hi Hat Elkhorn Mining Company* v. *Newman, supra,* the Court of Appeals of Kentucky called attention to the fact that the appellant, in that case, relied upon the case of *Consolidation Coal Company* v. *Mann,* 298 Ky. 28, 181 S. W. 2d 394. A reading of that opinion will disclose that the processing of coal was not involved or under consideration by the court, but, on the other hand, that opinion related solely to the liability of a coal company for placing refuse on appellee's land which had been taken from adjoining tracts of land.

In the Newman case, the Court of Appeals of Kentucky pointed out that the instructions given to the jury presented the only issue in the case and the correct measure of damages. These instructions authorized Newman to recover only for the dumping of mine refuse on his property which had been taken from other lands (10a). This was the issue

which the Court of Appeals of Kentucky declared was the only issue in the case.

Hi Hat Elkhorn Mining Company v. *Newman*, 352 (Ky) S. W. 2d 72.

It should also be remembered that in the Newman case the judgment was reversed because of excessive damages and with directions to grant a new trial on the sole issue of damages caused the plaintiff by the dumping of refuse from coal mined from lands other than those of the plaintiff.

Hi Hat Elkhorn Mining Company v. *Newman*, 352 (Ky) S. W. 2d 72.

It is thus quite clear that no issue in this case was decided by the Court of Appeals of Kentucky except the issue relating to right of the coal company to place refuse on Newman's land which it had mined from other lands. The question as to the right of the coal company to use its tipple and washer plant in connection with coal mined from other lands was not before the Court of Appeals of Kentucky and was not decided by it.

In that case, Newman sued to recover damages because of the processing of coal over his tract of land which had been mined from other lands. The Court of Appeals of Kentucky, in limiting his recovery to the damages caused by the dumping of mine refuse on his land, definitely held that he was not entitled to recover damages because of the use by the coal company of its tipple and washer plant in connection with coal mined from other tracts. Consequently, *Hi Hat Elkhorn Mining Company* v. *Newman, supra*, is direct authority supporting petitioner's view that the mineral deed from W. C. Goble, Commissioner, to Elkhorn Coal Corporation, expressly authorized it so process coal

which it had mined from lands other than the 418 acres described in the Goble deed.

It does not necessarily follow that because the coal company does not have the right to place refuse on Newman's land which have been taken from other lands that it does not have the right to use its tipple and washer plant in connection with coal mined from other tracts. In fact, the opinion of the Sixth Circuit which announces this strange rule, is in conflict with all the Kentucky cases on the same question.

In *Tolliver* v. *Pittsburgh Consolidation Coal Company*, 290 S. W. 2d 471 (Ky), it was contended that a coal company, under an identical mineral conveyance, did not have the right to operate its tipple and washer plant in connection with coal mined from other lands. In that case, the plaintiff was the owner of 125.6 acres of land. The defendant owned the coal and mining rights in a large boundary of land, which embraced the 125.6 acres, as well as other lands as far as three miles away. It began mining coal from these tracts of land and processing it over the coal tipple and washer plant which it had constructed on plaintiff's surface. Under these facts, the court decided that it had the right to use this tipple and washer plant in connection with the mining of coal from other lands. This is the only case in Kentucky which directly passes upon this identical question. It cannot, we submit, be distinguished.

In *Wells* v. *North East Coal Company*, 255 Ky. 63, 72 S. W. 2d 745, under an identical deed, a telephone and transmission line was built so that it could be used in conection with coal mined from other lands. All the coal had long since been mined from Wells' tract. It was contended that the coal company could not use the surface in this manner and the case of *Pike-Floyd Coal Company* v. *Nunnery, supra*, was relied upon.

The court pointed out that the distinction between the use of the surface for a dump for debris mined from other lands and the use of the surface for a tramroad, an electric power line and a telephone line, uses intimately connected with the purpose set out in the mineral deed, was quite manifest.

The same distinction must be made in the case at bar. Admittedly, the coal company has no right to use the surface of respondent's land for the storing of mine refuse taken from other lands as such use has only a remote connection with the purposes expressed in the mineral deed, but the use of the surface for the construction of a tipple and washer plant does have a direct connection with the purposes expressed in the mineral conveyance from the master commissioner to Elkhorn Coal Corporation.

It was also specifically held in that case that the right to construct and operate this telephone and electric transmission line was authorized by the mineral conveyance as this conveyance gave the grantee the right to maintain and remove and erect on the surface all structures that might be deemed necessary. In the instant case the mineral conveyance granted these same rights to Elkhorn Coal Corporation. The rights so conveyed may be summarized as follows:

> "* * * and such of the standing timber thereon as may by it, its successors and assigns, be deemed necessary for mining purposes, including the timber necessary for railroads or branch lines thereof that may be hereafter constructed upon said land and the exclusive right of way for any and all railroads and ways, pipe lines, telegraph and telephone lines that are now or may hereafter be located on said property by it, its successors or assigns, or by any person or corporation under authority of it, its successors or assigns, in, on, under concerning and appurtenant to

the hereinafter described tract of land together with the right to enter upon said land, use and operate the same and the surface thereof *and to make use thereof and for this purpose divert water courses thereon and use the same in any and every manner that may be deemed necessary or convenient by it, its successors or assigns, for the operation, mining and removal therefrom or otherwise utilizing thereon said minerals and mineral products and substances, and for the transportation therefrom of said articles and the right to the use of such as well as for the removal over or through said land, the products taken out of any other land owned or hereafter acquired by it, its successors or assigns and the right to erect upon said land, maintain use and at its pleasure remove therefrom all such buildings and structures as may be necessary or convenient to the exercise and enjoyment of the rights and privileges herein set forth and in the use of said land and surface thereof it, its successors and assigns, shall be free from and they are relieved from all liability or claim of damages to the surface owners their personal representatives, heirs or assigns,* * *" (Our italics)

(Respondent's Exhibit No. 1, Pages 2-3)

Wells v. *North East Coal Company, supra*, was followed and approved by the Court of Appeals of Kentucky in the case of *Trivette* v. *Consolidation Coal Company*, 296 Ky. 529, 177 S. W. 2d 868.

The case at bar, we submit, cannot be distinguished from *Tolliver* v. *Pittsburgh Consolidation Coal Company*, 290 S. W. 2d 471 (Ky); *Wells* v. *North East Coal Company*, 258 Ky. 63, 72 S. W. 2d 745; and *Trivette* v. *Consolidation Coal Company*, 296 Ky. 529, 177 S. W. 2d 868.

When these cases are applied to the instant case, it must be held, we submit, that the petitioner and its predeces-

sor in title were authorized to construct, operate and maintain its tipple and washer plant, all of which it had done for many years without any objection on the part of the respondent (40b).

If the coal company could construct a high tension and electric line for the purpose of mining coal from other lands without any liability for damages to the surface owner and this is the holding of the court in the case of *Wells* v. *North East Coal Company, supra*, and *Trivette* v. *Consolidation Coal Company, supra*, upon what principle can it be maintained that petitioner does not have the right to construct, operate and maintain a tipple and washer in connection with coal mined from other lands.

The opinion of the District Judge is, we submit, a sound construction of the mineral conveyance to Elkhorn Coal Corporation (49a-50a, Appendix Pages 23-28).

Counsel for respondent admits that the coal company has the right to use Newman's land for the transportation of coal mined from other tracts. As noted by the District Judge, there is no point in hauling coal over Newman's land except for the purpose of selling the coal and in order that the coal can be sold it must be washed (49a-50a, Appendix Pages 23-24).

It is, therefore, quite clear, we submit, that the right to process coal, mined from other lands over its tipple and washing plant, is expressly authorized by the provisions of the mineral conveyance to Elkhorn Coal Corporation.

There is another error in the opinion of the lower court. It held that the coal company had the right to construct the coal tipple and washer plant to process coal mined from Newman's land, but that it could not use these facilities in connection with coal mined from other lands.

Newman v. *Hi Hat Elkhorn Coal Company*, 298 F. 2d at page 120.

Petitioner is the owner by lease of 418.13 acres of coal and the mining rights conveyed to Elkhorn Coal Corporation by the master commissioner of the Floyd Circuit Court (Kentucky). This 418.13 acres of mineral land embraces the surface tract owned by respondent as well as other lands (See respondent's Exhibits Nos. 1 and 2).

The effect of the opinion of the lower court is, therefore, to hold that the petitioner may not use the tipple and washer plant in connection with coal mined off the land now owned by respondent, but within the boundary described in the above mentioned mineral conveyance.

Such a holding, we submit, cannot be sustained.

The case of *West* v. *American Telephone & Telegraph Company,* 311 U. S. 223, strongly supports our position that this is a type of case in which a writ of certiorari should be granted by this Court. It was pointed out in that case that the highest court of the state is the final arbiter of what is state "law".

Applying this rule to the case at bar, the court should sustain this petition for writ of certiorari just as it did sustain a similar petition in the case of *West* v. *American Telephone & Telegraph Company, supra.*

Estoppel

h. This record shows without any contradiction that a tipple on Newman's land was constructed in 1936 and has been in continuous operation ever since said time except for a period of two months. This delay was caused by the fact that the tipple burned in 1943 and it took about two months to rebuild it (40b).

The construction of the washer plant was commenced in 1956 and it was in operation on January 1, 1957 (20b). Before the washer was built, the tipple was used for the purpose of screening and sizing the coal.

Coal mined from other lands was processed over the tipple for over twenty (20) years. This was well known to the respondent (17a, 9b-11b).

During this time he made no objection to the use of the tipple for the processing of coal. When asked why he did not object to the construction of this washer, he made this statement "Well, I didn't to them because they did not say anything to me about it" (9b). He also testified that for twenty years coal had been processed over the tipple which had been mined from other lands and he thought that this was authorized by the mineral conveyance until his lawyer gave him different advice (17a).

In *Newman* v. *Hi Hat Elkhorn Coal Company*, cited by the Sixth Circuit (on January 23, 1962) and reported in 298 S. W. 2d 119, the court stated that the evidence on the question of estoppel would have to show that Newman had knowledge of the intended use of the washer at the time it was put in operation.

> *Newman* v. *Hi Hat Elkhorn Coal Company*, 298 F. 2d at page 120.

Conceding that this is a correct statement of the rule, the record in this case shows without any contradiction that he knew they intended to process coal over this washer plant which was to be mined from other lands (17a, 10b-11b, 40b). With such knowledge, he stood silently by and permitted the predecessor in title of the petitioner to make an investment of over $200,000.00 in the construction of this washer plant and delayed almost two years before filing an action in the Floyd Circuit Court (Kentucky) against Hi Hat Elkhorn Mining Company (50a-51a, 39b-40b). In that action he only sought damages and no injunctive relief (Petitioner's Exhibit No. 3, pp. 1-3). These undisputed facts clearly support the finding of the District Judge (50a-51a) that the

respondent was estopped from questioning the authority of petitioner to operate and maintain the washer plant.

McDonald v. *Burke*, 288 S. W. 2d (Ky) 363.

As respondent had actual knowledge of the intended use of the washer at the time it was constructed and placed in operation, the plea of estoppel is well taken and should be sustained.

Adverse Possession

1. The following facts are established by this record without any material contradiction.

1. Payne Baber Coal Company, the immediate predecessor in title of Hi Hat Elkhorn Mining Company, in 1936 constructed a coal tipple on the land of Newman. This tipple was used continuously for the processing of coal mined from other land until 1943, when it was destroyed by fire (39b-40b).

2. A new tipple was constructed by Hi Hat Elkhorn Mining Company two months later, was put in operation in 1943 and was used continuously for such processing of coal for more than fifteen years prior to the institution of this action by respondent (39b-40b).

3. The washer plant was constructed in 1956 and first used in 1957 (20b, 39b). This washer was merely an addition to the tipple and an integral part of such structure.

4. The only difference in the operation of the tipple and the operation of the tipple and washer is that the washing of the coal is more automatic (41b-43b).

We respectfully submit that under this undisputed evidence that the petitioner established title to its right to process coal over these facilities which had been mined from other lands by adverse possession. It did everything from

1943 until 1957 that it is doing now except it washed coal automatically when it formerly washed it by hand. The handling of the coal in the tipple was just another method of processing it. In 1957 the method was changed by the construction of the washer, which is an integral part of the tipple. The petitioner had established its right to use its tipple for the processing of coal from other lands as it had done so for more than fifteen years (See evidence of respondent, 17a).

The Court of Appeals (Sixth Circuit) undertook to dispose of the defense of adverse possession and estoppel by the following observation appearing in the opinion handed down on May 7, 1962.

> "It also appears that the same issues relating to estoppel and the statute of limitations as are involved in the present case were raised in that case in the Circuit Court of Floyd County, Kentucky. They were apparently rejected by the Circuit Court and not pressed in the Kentucky Court of Appeals. If these defenses were not valid in the Kentucky courts they would not be recognized in the federal court sitting in Kentucky." (Opinion on Petition for Rehearing, See Appendix 34-35).

In *Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. 2d (Ky) 71, the jury were instructed that the only damages to which the respondent was entitled to recover was the damages caused to his land by the depositing thereon of mine refuse taken from other lands (10a). The Court of Appeals of Kentucky definitely decided that this was the only issue in the case before it.

> *Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. 2d (Ky.) at page 72.

As to this one question we do not conceive how Hi Hat Elkhorn Mining Company could rely on the defenses of estoppel and adverse possession. In fact, they did not so rely. (See Petitioner's Exhibit No. 3, 44-50). By the pleading filed by Hi Hat Elkhorn Mining Company, estoppel and adverse possession were relied upon insofar as plaintiff's complaint sought damages because of the processing of coal mined from other lands. (See same exhibit, page 50).

Moreover, these two defenses were not considered by the Circuit Court or by the Court of Appeals of Kentucky because they were not applicable to the only issue in the case, the liability of the coal company for damages to respondent's land caused by the depositing thereon of mine refuse taken from other land.

These two defenses are still available to the respondent and the Sixth Circuit erred in not so adjudging.

Res Adjudicata

j. In the suit filed by Newman in the Floyd Circuit Court (Kentucky) against Hi Hat Elkhorn Mining Company, injunctive relief was not requested but Newman was modest enough to sue for $50,000.00 because of the processing of coal from other lands (See complaint filed by Newman, Exhibit No. 3 of Petitioner, pp. 1-3).

He wholly failed to make a case on this point and the effect of the judgment entered by the Floyd Circuit Court (Kentucky) was to dismiss his complaint as to the processing of such coal (Petitioner's Exhibit No. 3, 58-59). Newman, in that suit, did the very thing which has been frequently condemned by the Court of Appeals of Kentucky. He undertook to split his causes of action. He first sued for damages and then after the petitioner had purchased the assets of Hi Hat Elkhorn Mining Company for $500,-

000.00 (33a) he filed the present suit seeking injunctive relief.

As Newman did not seek any injunctive relief in the suit filed against petitioner's predecessor in title but only sued for damages because of the processing of coal mined from other lands, he cannot now change his course of action and seek injunctive relief.

Johnson v. *Dry Creek Oil & Gas Company*, 283 Ky. 340, 141 S. W. 2d 263.

Rowe v. *Shepherd*, 283 S. W. 2d (Ky) 188.

Conclusion

This petition is submitted because we feel that the court below has decided an important state question in conflict with applicable state law. The opinion of the court below, we submit, is in conflict with at least three opinions of the Court of Appeals of Kentucky. Those opinions are:

Tolliver v. *Pittsburgh Consolidation Coal Co.*, 290 S. W. 2d 471.

Wells v. *North East Coal Company*, 255 Ky. 63, 72 S. W. 2d 745.

Trivette v. *Consolidation Coal Company*, 296 Ky. 529, 177 S. W. 2d 868.

If the respondent is able to secure the injunctive relief which he seeks by his complaint (3a-4a) this will force the petitioner to close its mining operations at Hi Hat, Kentucky.

The two opinions of the Court of Appeals (Sixth Circuit) abrogate, we submit, a law of property which has been in force in Kentucky for over fifty years and this case presents such serious consequence to every coal operator in the Commonwealth of Kentucky and is of such importance that the questions, herein raised, should be settled by this Court.

As the opinion of the Court of Appeals (Sixth Circuit) is in conflict with the applicable state law as determined by the Court of Appeals of Kentucky, this case presents a typical situation in which the writ, applied for by petitioner, should be granted.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223.

We respectfully request that the judgment of the Court of Appeals be reversed insofar as it holds that the petitioner may not use its tipple and washer plant in connection with coal mined from other tracts of land.

Respectfully submitted,

JOE HOBSON,
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Prestonsburg, Kentucky,
Counsel for Petitioner.

APPENDIX

(Caption omitted)

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY AT PIKEVILLE

THE COURT: The Court is in no doubt about this case. It would serve no purpose to put the parties to the expense of both money and time in delaying this case for the purpose of briefing. The plaintiff's complaint should be dismissed, it seems to me, on four counts.

In the first place, the language of the commissioner's deed of 1929 gives the coal company the right to use the surface of this tract of land for hauling coal, its or anybody else's and there is also an implied understanding, if not expressed in so many words, that the purpose of hauling the coal is to sell it. You just don't get over there and haul coal over the land and haul it back. The reason that was put in there is that it was meant to be hauled to a place where it could be launched into trade.

Now, conditions are such and the Court with some knowledge of coal operations, serving in the capacity as a federal judge in this Eastern District of Kentucky for nearly a quarter of a century, having quite a few cases involving coal production, as well as observation and knowledge, there has been a decided change, somewhat radical at times, other times gradual, in the manner of selling coal. Parties must necessarily be charged with reasonable contemplation of what their commitments are going to be in the future. You can't sell coal now without washing it. It can be sold, but you can't sell it economically. It is not only in the record, but it is a matter almost an accepted fact in this whole area.

Under the terms of the contract, the defendant had the right to haul the coal over the land. Why?—in order to sell it. Either that that was mined on the leasehold or any other coal. Then when it comes to the proposition, "Well, we can't sell it without washing it," there is a reasonable implication that that also was in the minds of the parties

at the time they made the contract, at the time the deed was made. They don't have to stop and make another contract every time there was a reasonable change in the methods which the parties had in mind at the time the contracts were entered into. And so, to say that the plaintiff admits that, as counsel has said, and as the evidence in this case certainly warrants him as saying, that they can't object to hauling coal over the plaintiff's land, but they can object to selling it after they haul it over the land, seems to me to be rather a novel situation there.

There is no point in hauling it over the land except to sell it. In order to sell it; it has to be washed. The Marlowe case did not have a provision in the lease such as we have in this commissioner's deed of 1929. Here there is an express right with all reasonable implications which go with an express right. I think it is entirely within the meaning and reasonable and valid interpretation of the contract of 1929 and the deed of 1929, which was made as a result of a lawsuit or court proceedings, that it was meant by the parties and understood by the parties that they could use the land to haul other coal from other leaseholds for the purpose of sale. And so the plaintiff must lose his case on that point.

Also, I think there is a clear case of estoppel. This same condition has been going on for many years, right there under the observation of the plaintiff. He made no protest, he let the defendant go on to substantial expense. He kept silent and let these people make an investment. If he didn't know that was a washing plant, he should have found it out. I am of the opinion that he knew what it was and he says he knew they were building something there and he doesn't say that he knew exactly that it was a washing plant, but that he didn't know that he was going to be damaged by it. Well, that is a matter of a failure to know the law. They were there for the purpose of selling coal and they went into this operation, the tipple burned down, they built another tipple, and then they built this washing plant—he said nothing—went on for years, even some two or three years after the washing plant went into operation and said nothing. And I don't think he can

come in now in good conscience and say that, "I have been damaged because they built this washing plant. They owe me damages." He knew the terms of his contract, he was advised fully. The other case which counsel cited on this question of estoppel I do not think is applicable here because he had within his knowledge this contract, the source of his title, and the responsibilities and obligations which he as the lessor was charged with knowing. That was to know what was going on and to know the law applicable to it. He knew the facts and he was charged with knowing the law. So I think he is estopped to make any claim here and his complaint would have to be dismissed on that ground.

Now, while the action in the Floyd Circuit Court may not be considered literally as res judicata, it is certainly a strong authority which is entitled to the respect of this court. I am not going to say literally because I am not sure that all of the requisite elements of res judicata are present, but you do have the same situation where these same litigants were engaged in a lawsuit in the Floyd Circuit Court in Prestonsburg, and the judge after hearing all of the evidence in the case submitted it and limited the issue to be determined by the jury to one narrow proposition and did not submit to the jury this question that is claimed here in this case, other than the amount of damages. The only thing that was submitted in that case was the question of damage to his property beyond the terms of the contract and beyond the circumstances that were proven in the case. And so I think that the Court would be justified, aside from these other defenses, in following that ruling here—call it res judicata, stare decisis, of whatever you want to call it. It is authority for the court to take the same view here and the plaintiff's case should be dismissed on that ground.

I think another thing that has been established here is that the plaintiff hasn't suffered any loss. He was, I am aware, awarded $500 in the state court. That is for them to decide. I don't think the court is bound by that, but in order to recover, it is necessary that this plaintiff show by a preponderance of the evidence and sustain the burden of prov-

ing that he has been damaged. Now, there has been no proof here that his estate, the surface of his land, has any less market value than it did before this operation took place. The record is barren of that. There is some vague statement here about raising 10 acres of corn, without saying how many bushels to the acre, whether 30, 40, 90 bushels per acre. Then there was another witness who testified that it was probably 30 acres of cleared land and they raised a garden, corn. All of that testimony is so vague I can't give a money judgment against this defendant on such vague, unconvincing testimony as that, even if he were entitled to recover. I think he would have to fail here because he has failed to establish any damage. Damages must be certain. You just can't give people's money away on the theory that maybe something will happen. It must be positive proof and the burden is on him who claims the damages to establish his right to recover by a preponderance of the evidence.

As a matter of fact, the plaintiff not only failed to sustain the burden of proof, by a preponderance of the evidence, but the preponderance of the evidence was the other way. He did have this tract of land up there, but it wasn't of any great value, it wasn't any great farm or subject to any substantial production, and the only evidence that is shown is that the man rented it for $10.00 a month, rented it for $10.00 a month before, for the past—I believe he said 10 or 15 years—some several years he rented it for $10.00 a month before these things that are claimed here happened and he rented it for the same thing since they have happened, some two or three years, and that would certainly be no indication that he had been damaged in his income off of the property. It is not shown that he farmed it, got anything, sharecropper or anything of that kind. There is just nothing shown, yet the Court is asked to enter judgment. There has got to be something more than just a vague surmise or suggestion. If the plaintiff can't make out his case, he can't expect the Court to make it out for him and I am certain I don't know what the income off of his property was other than $10.00 a month. He hasn't lost anything because he still is getting it, and the evidence of the witness for the defendant to the effect that this slag pool has not interfered at all with any

farming operation which he had other than the pool, itself, which is not shown to be more than a quarter of an acre or some relatively small tract of land and has caused no inconvenience. There are some inferences that he was delayed in going in and out. There is proof to the contrary that they are not delayed in going in and out by reason of the trucks, but those conditions exist out on 460. We can't call industry off just because it inconveniences a few riders. Certainly, trucks do delay us in our travel, but if it wasn't for the trucks we might not have money enough to travel. So, you have got to recognize that industry must be served in its enterprise as well as the convenience of the public.

I don't want to deny the plaintiff the right to be heard further if he wants to have the record written up and brief this case on motion to reconsider or something of that kind, but I always go on the theory that justice delayed is justice denied and after I hear a case, if I don't have doubt how it should be decided, I think it is my duty to decide it from the bench.

It is the judgment of the Court that the complaint be dismissed and that the defendant have judgment for his costs.

Mr. Combs: I would like to request finding of fact at this time. I would like for the Court to determine a finding of fact or conclusion of law or both, whether the defendant is entitled to continue to dump refuse from coal from other lands on this land.

The Court: It is the judgment of the Court that he is entitled to recover, this defendant is entitled to continue doing what it is doing now and within the reasonable deductions from the terms of the contract, they are entitled to dump slag or this refuse that is gotten from this washing enterprise from this leasehold or from other leaseholds that are hauled over this land. Now, that doesn't mean that he can go out and invite everybody to come in, but where they are actually handling in their operation over this land, bringing this coal there, they are entitled to continue to do as they say they are doing now and that is to dump this into this pool of slag, or whatever you call it.

Now, there may be another case. I am not going to say that they have any further right to impose more than what they are doing now. That is as far as we can go, we can't anticipate. That doesn't give them a right to go up and open up another pool near his house or whatever his other property is. I can only take the case as I find it and not try to anticipate something for the future.

That will be the ruling of the Court and I think this oral opinion conforms to the requirements of the rule.

Mr. Hobson: We are willing for the opinion to be treated as findings of fact.

Mr. Combs: We are also, Your Honor, subject of course to our right to request additional findings if we deem it necessary.

The Court: I think this oral opinion that I have given from the bench contains sufficient findings of fact and conclusions of law without more formal findings and I think it fully complies with the provisions of Rule 52. So no findings of fact and conclusions of law in addition to what I have given in this opinion need be filed.

* * * * * * *

I, Ella E. Dunifer, Official Reporter, United States District Court, Eastern and Western Districts of Kentucky, do certify that the foregoing constitutes a true, full and accurate transcript of the proceedings had in connection with the Court's Oral Opinion and Judgment, in case No. 580, *Ted Newman* v. *Hi Hat Elkhorn Coal Company*, when tried in the United States District Court for the Eastern District of Kentucky, at Pikeville, on June 1, 1960, before His Honor, Mac Swinford, Judge of said Court.

In Testimony Whereof, Witness my official hand as reporter aforesaid, this the 5th day of July, 1960.

____, ____

Official Reporter.

Rendered December 8, 1961

COURT OF APPEALS OF KENTUCKY

APPEAL FROM FLOYD CIRCUIT COURT, HON. EDWARD P. HILL, JUDGE

HI HAT ELKHORN MINING COMPANY, *Appellant*,

v.

TED NEWMAN, *Appellee*.

OPINION OF THE COURT BY COMMISSIONER CLAY

REVERSING

This is a suit for damages brought by the appellee owner of the surface of land against the appellant owner of the coal mining rights thereunder. The cause of the complaint was the dumping of refuse on the surface incident to the washing and otherwise processing of coal mined on both appellee's property and other tracts. The jury was instructed appellant had no right to injure the surface by discharging refuse from coal brought in from other lands, and it awarded appellee $2500.

Appellant's principal contention is that under a standard mineral deed it could legally process coal and dump refuse on appellee's land regardless of the source of the coal. The right to do so, if it exists, arises from a provision of the mineral deed which permits appellant to use the surface of appellee's land "for the removal over and through said land, (of) the products taken out of any other land owned or hereafter acquired" by appellant. That such a provision does not give the right contended for was decided in *Pike-Floyd Coal Co. v. Nunnery*, 232 Ky. 805, 24 SW 2d 614. While dumping refuse may be an integral part of the *mining operation* on a particular tract, it is not an authorized incident of *removing* coal from other tracts.

The case relied on by appellant, *Consolidation Coal Co. v. Mann*, 298 Ky. 28, 181 SW 2d 394, did not involve the

appropriation of the surface of plaintiff's land but concerned the right of a mine operator to maintain a nuisance created by normal mining operations on adjacent property.

Complaint is made of the instructions, which we find properly presented the only issue in the case and the correct measure of damages. The testimony complained of was either competent or, if incompetent, was not material or prejudicial.

Appellant's final contention is that the damages were excessive. While there was adequate evidence of a difference in the reasonable market value of appellee's farm as a result of appellant's processing operations, such proof was not limited to the damages caused within the last five years by that part of the operation which was wrongful. We recognize the difficulty of proving damages in a case of this sort, but it appears the proof and the verdict included damages for which appellant was not liable. Without proper proof to support it, we find the verdict was excessive. For this reason the judgment must be reversed.

The judgment is reversed with directions to grant a new trial on the sole issue of damages caused the plaintiff by the dumping of refuse from coal mined on lands other than those of the plaintiff.

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Filed January 23, 1962. Carl W. Reuss, Clerk

No. 14470

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TED NEWMAN, *Plaintiff-Appellant*,

v.

HI HAT ELKHORN COAL COMPANY, *Defendant-Appellee*.

Appeal from the United States District Court for the Eastern District of Kentucky, at Pikeville.

Decided January 23, 1962

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges

PER CURIAM. This case originated in the Circuit Court of Floyd County, Kentucky and was removed by the coal company to the District Court on the ground of diversity of citizenship.

It was an action to recover damages and for injunction to restrain defendant from the processing of coal and dumping of refuse therefrom on plaintiff's lands which coal had been mined on lands other than plaintiff's.

The District Judge heard the case without a jury and at the close of the evidence delivered an oral opinion in which he found in favor of the coal company and dismissed the complaint. He did not adopt findings of fact and conclusions of law.

Newman was the owner of the surface of certain land in Floyd County, Kentucky. The minerals had been severed from the land by a mineral deed to Elk Horn Coal Corporation which also granted ". . . the right to the use of such [land] as well for the removal over and through said land, the products taken out of any other land owned or hereafter acquired by it [Elk Horn], its successors or assigns. . . ." The defendant held under lease from the Elkhorn Coal Corporation.

The principal question in the case was whether the mineral deed authorized the coal company to use Newman's land to process coal mined from other lands and dump on it the refuse therefrom. The District Judge held that such use was authorized by the language of the deed and also by necessary implication.

The Court of Appeals of Kentucky has since construed the language of this deed in the case of *Hi Hat Elkhorn Mining Co.* v. *Ted Newman*, . . . S. W. 2d . . ., and held otherwise. The Court said:

> Appellant's principal contention is that under a standard mineral deed it could legally process coal and dump refuse on appellee's land regardless of the source of the coal. The right to do so, if it exists, arises from a provision of the mineral deed which permit appellant to use the surface of appellee's land "for the removal over and through said land, [of] the products taken out of any other land owned or hereafter acquired" by appellant. That such a provision does not give the right contended for was decided in *Pike-Floyd Coal Co.* v. *Nunnery*, 232 Ky. 805, 24 S. W. 2d 614. While dumping refuse may be an integral part of the *Mining operation* on a particular tract, it is not an authorized incident of *removing* coal from other tracts.

It is, therefore, clear that the deed does not authorize the coal company to use Newman's land in the manner which it claims.

Since the present case is a diversity case involving the construction of a deed conveying mineral rights in Kentucky real estate, the decision of its highest court as to the law of that state is binding on us. *Tompkins* v. *Erie Railroad Co.*, 304 U. S. 64; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223.

It is further claimed by the coal company that Newman knew that the coal tipple and washer plant used to process coal was being constructed on his land at great expense by its predecessor in title in 1956 and that Newman made no objection thereto and is, therefore, estopped from objecting to its use.

The coal company had the right to construct the coal tipple and washer plant to process coal mined from Newman's land. It is the use of these improvements to process coal mined from other lands to which Newman objects and was sustained by the Kentucky Court of Appeals. Newman testified that he had no knowledge of the dumping of slate on his property from coal mined from other lands prior to the use of the new equipment; that he was not consulted as to the erection of the improvements in 1956 or their intended use to process coal mined from other lands although he knew they were being constructed. If this is true, it could hardly be claimed that the coal company had a perpetual right to use his property without compensation to process coal mined from other lands, dump refuse therefrom, and damage his property.

We think the evidence on the subject of estoppel would have to show that Newman had knowledge of the intended use, not merely that he should have known.

The District Court should also determine whether Newman is entitled to injunctive relief.

Judgment reversed and cause remanded for a new trial.

Filed May 7, 1962. Carl W. Reuss, Clerk

No. 14470

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TED NEWMAN, *Plaintiff-Appellant*,

v.

HI HAT ELKHORN COAL COMPANY, *Defendant-Appellee*.

On Petition for Rehearing and Modification of Opinion

Decided May 7, 1962

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

PER CURIAM. Appellee contends that we have misconstrued the opinion of the Court of Appeals of Kentucky which was handed down in the case of *Hi Hat Elkhorn Mining Co.* v. *Ted Newman*, 352 S. W. 2d 71 and was the basis for our decision. We have reviewed the briefs filed in that case and find that substantially the same arguments were made by appellee's predecessor in title as were urged upon us by appellee in the present case and it relied on the same authorities. The opinion of the District Court in the case at bar was also cited to the Kentucky Court of Appeals.

We cannot ignore the plain language in the opinion of the Kentucky Court of Appeals which rejected the contentions of the mining company and clearly held that it did not have the right to use Newman's land to process coal mined from other lands and dump the refuse therefrom on his land.

It also appears that the same issues relating to estoppel and the statute of limitations as are involved in the present case were raised in that case in the Circuit Court of Floyd County, Kentucky. They were apparently rejected by the Circuit Court and not pressed in the Kentucky Court of

Appeals. If these defenses were not valid in the Kentucky courts they would not be recognized in the federal court sitting in Kentucky.

We see no merit in the defense of res adjudicata as applied to damages occurring after August 1, 1959. In the Kentucky case damages were awarded to August 1, 1959 which was the date when appellee acquired the mineral rights from its predecessor in title.

Newman's damages here are limited to those occurring after August 1, 1959.

The Petition for Rehearing and Modification of Opinion is denied.

(2583-2)